MD NAYAN SALLEH & ANOR v. WEIDA RESOURCES SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
SUPANG LIAN J
[SUIT NO: KCH 22IP-3-10-2014 (HC3)]
30 JANUARY 2019

TORT: *Damages – Assessment – Unlawful interference of trade and trade libel – Finding of liability – Order for general damages – Sealed order of assessment by Senior Assistant Registrar ('SAR') contained different figure from written grounds of decision – Whether amounted to misdirection – Whether reasons given for difference – Whether vitiated decision – Whether rendered order of SAR bad in law*

TORT: *Defamation – Libel – Unlawful interference of trade and trade libel – Publication of press statement or article causing damage to goodwill and reputation – Finding of liability – Assessment of general damages – Whether evidence adduced to show extent of losses – Global award for loss of profits grounded on documentary evidence of third party – Whether losses substantiated by evidence – Whether actual damage caused by trade libel pleaded or proven – Whether entitled to general damages for loss of goodwill and vindication of reputation although actual loss not proved*

The plaintiffs' action against the defendants was for the infringement of its grease trap patent causing the plaintiffs to suffer loss and damages. The defendants denied the allegation of infringement and filed a counterclaim against the plaintiffs for, *inter alia*, trade libel and unlawful interference with trade arising from the publication of a press statement or article by the plaintiffs which had allegedly caused damage to their goodwill and reputation. The court dismissed the plaintiffs' claims whilst, in respect of the counterclaim, it was ordered that (i) the first to fourth defendants' declarations in prayers 33.1 and 33.2 were dismissed; (ii) there was no necessity for the declarations sought in prayers 33.3 and 33.4; and (iii) that general and aggravated damages, if any, to be assessed by the Senior Assistant Registrar ('SAR'). Dissatisfied, the plaintiffs appealed to the Court of Appeal. In the meantime, the SAR proceeded with and concluded the assessment of damages. The plaintiffs were unhappy with the decision of the SAR and filed the present appeal. Subsequent to the SAR's assessment, the Court of Appeal delivered its judgment which amongst others, affirmed the Order of the High Court except that the aggravated damages awarded was ordered to be set aside. In the present appeal, the court only dealt with the plaintiff's appeal against the award of general damages. The plaintiffs contended that: (i) the SAR had erred in law in holding the first to fourth defendants were entitled to general damages; (ii) there were inconsistent quantum of damages awarded; and (iii) the quantum of damages awarded was not proven.

Held (allowing appeal in part):

(1) The High Court Judge ('HCJ') found and held that the first to fourth defendants had proven their claim of unlawful interference of trade and trade libel. Accordingly, the plaintiffs were liable for the torts of trade libel and unlawful interference with a trade committed against the first to fourth defendants. The finding of liability was the basis for HCJ's order that general and aggravated damages, if any, was to be assessed by the SAR. The words 'if any' were mere surplusage and certainly could not be used as a basis to nullify the trial judge's finding that the plaintiffs were liable to the first to fourth defendants for trade libel and unlawful interference with trade. There could not be an order for assessment of general and aggravated damages if there was no finding of liability on the allegation of trade libel and unlawful interference with trade. As such, the SAR had not erred in law in concluding that the first to fourth defendants were entitled to general damages. (paras 13-15)

(2) The terms of the SAR's Order, which was perfected and sealed, were the true orders and decision of the SAR. Therefore, until the Order was set aside or amended, it remained in force. The grounds of decision of the SAR, rightfully, should consist of the reasons and explanation for the decision and orders given. If, in her grounds of decision, the SAR came up with a different figure or award from that given when delivering her decision, that would be a misdirection on her part. It is trite that a judgment or decision cannot be varied or amended in that manner, that is, by way of the grounds of decision. However, the misdirection on the part of the SAR in explaining or reasoning out her decision could not vitiate the decision or its terms. Therefore, there was no merit in the plaintiffs' contention that the SAR's Order was bad in law because it was inconsistent with the written grounds of decision and ought to be set aside. (paras 18 & 19)

(3) The fourth defendant had not adduced any evidence whatsoever to show to what extent the fourth defendant's trade or business was affected financially due to the publication. Hence, the quantum of RM600,000 in general damages awarded by the SAR to the fourth defendant in respect of both unlawful interference with trade or business and trade libel could not be sustained. (para 21)

(4) Further, the computation of the alleged loss of profits of the first to third defendants in the financial years 2013, 2014, 2015 and 2016 was partly based on the documents of Wieda Marketing Sdn Bhd, a separate legal entity and the issue of lifting the corporate veil to show the nexus between the latter and the first to third defendants had neither been pleaded nor argued. As such, the global award of RM600,000 to the first

to third defendants was flawed because it was grounded partly on documentary evidence of a stranger. The SAR also had taken into account that the publication had left the first to third defendants with no alternative but to take proactive remedial measures to salvage and repair their clients' confidence in them wherein the first to third defendants invested RM328,291.64 in more promotional and marketing activities. However, there was no evidence adduced by the defendants for the previous expenses on their promotional and marketing activities to show how much more they had expended on the purported extensive marketing exercises to recover their position in the market. Hence, the figure of RM328,291.64, was unsubstantiated. (paras 26 & 27)

(5) The evidence of PW2, a qualified accountant who gave his expert finding, was of no assistance to the plaintiffs. The self-generated tables produced by the defendants to show loss of profits by the first to third defendants were also unreliable because the financial statements produced in court showed that there were profits made during the material time, whilst some sales had not been captured in the table. Such failure by the defendants clearly demonstrated that the purported reduction of sale in the year of 2014 was not reliable. The defendants also continued to sell the products during the subsistence of the interim injunction, hence, it did not lie in their mouth to say that they had suffered hardship and loss because of the prohibition. Further, had the SAR considered that the sale could not be completed due to want of stock rather than as a result of the publication, there would not have been a substantial award of damages to the first to third defendants. (paras 28-30, 35 & 36)

(6) Hence, the global award of RM600,000 in general damages to the first, second and third defendants and RM600,000 to the fourth defendant for trade libel and unlawful interference with trade were unsubstantiated and therefore unsustainable. However, in law, where no actual damage caused by the trade libel has been pleaded or proved, general damages can still be awarded for loss of goodwill and for vindication of reputation. Therefore, although the first to fourth defendants had failed to prove actual loss and the extent to which their business or trade was affected financially by the libelous publication, they were nonetheless entitled to general damages for loss of goodwill and vindication of reputation or trade libel. In the circumstances, the plaintiffs were ordered to pay the first, second and third defendants RM60,000 each and RM170,000 to the fourth defendant in general damages for loss of goodwill and for vindication of reputation. (paras 22, 37, 41 & 46)

Case(s) referred to:

Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat [2011] 1 LNS 1441 HC ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] 1 LNS 62 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 1 LNS 284 FC ***(refd)***

Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Sdn Bhd & Ors [2001] 3 CLJ 571 HC ***(refd)***

For the appellants - Jimmy Simon Maja; M/s Maja & Assocs
For the respondents - Cecil Ha; M/s Ibrahim & Co Advocs

Reported by S Barathi

JUDGMENT

Supang Lian J:

[1] On 15 October 2014, the plaintiffs initiated this civil action against the defendants alleging that the defendants had infringed its grease trap patent causing them to suffer loss and damages. The defendants denied the allegation of infringement and filed a counterclaim against the plaintiffs for, *inter alia*, trade libel and unlawful interference with trade arising from the publication of a press statement or article by the plaintiffs which had allegedly caused damage to their goodwill and reputation.

[2] After a full trial, Stephen Chung J on 29 December 2016 dismissed the plaintiffs' claims against the first to fifth defendants with costs. In respect of the counterclaim of the first to fourth defendants, the learned trial judge ordered as follows:

(i) The first to fourth defendants' declarations in prayers 33.1 and 33.2 are dismissed;

(ii) There is no necessity for the declarations sought in prayers 33.3 and 33.4; and

(iii) That general and aggravated damages, if any, to be assessed by the Senior Assistant Registrar.

[3] Being dissatisfied with the decision of the learned High Court Judge, the plaintiffs filed an appeal to the Court of Appeal.

[4] In the meantime, the Senior Assistant Registrar ("SAR") proceeded with and concluded the assessment of damages. On 26 January 2018 the SAR ordered as follows:

(i) the plaintiffs to pay general damages of RM600,000 to the first, second, third defendants and RM600,000 to the fourth defendant;

(ii) the plaintiffs to pay aggravated damages of RM400,000 to the first, second, and third defendants and RM400,000 to the fourth defendant;

(iii) the plaintiffs are to pay interest on the judgment sum at the rate of 5% per annum from the date of the order until full and final settlement; and

(iv) there will be no order as to costs.

(see the sealed order dated 26 January 2018 annexed as Appendix "C" to plaintiffs' submission encl. 241).

[5] The plaintiffs were unhappy with the decision of the SAR and filed a notice of appeal to the judge-in-chambers on 5 February 2018. This is the present appeal before me.

[6] The Court of Appeal delivered judgment on 9 February 2018 and ordered as follows:

(i) Appeal is dismissed with costs to the respondents (the defendants) subject to the payment of allocatur; and

(ii) Order of the High Court is affirmed except that the order for the aggravated damages awarded to the first to fourth respondents be set aside.

[7] It will be noted that the decision of the learned SAR was delivered before the delivery of the Court of Appeal decision. Pursuant to the judgment of the Court of Appeal, the first to fourth defendants are not entitled to aggravated damages.

[8] I therefore need only to deal with the appeal of the plaintiffs against the award of general damages.

[9] The plaintiffs are contending that:

(i) The learned SAR had erred in law in holding the first to fourth defendants are entitled to general damages;

(ii) There are inconsistent quantum of damages awarded; and

(iii) The quantum of damages awarded is not proven.

Whether The Learned SAR Had Erred In Law In Awarding General Damages To The First To Fourth Defendants

[10] The plaintiffs argue that in law, assessment of damages is only allowed when there is infringement of rights. However, under the amended judgment dated 29 December 2016 (tab 1 of defendants' BOA encl. 244) the learned High Court Judge ordered that "In respect of the first to fourth defendants' counter-claim, general damages and aggravated damages, if any, to be assessed by the Senior Assistant Registrar". In view that the learned trial judge has used the words "if any", it is necessary to refer to the reliefs sought by the first to fourth defendants which are as stated in paras 33.1, 33.2, 33.3, 33.4, 33.5, 33.6, 33.7, 33.8 and 33.9 of the counterclaim.

[11] The judgment shows that the claim for declarations in paras. 33.1 and 33.2 were dismissed; it was ordered that there was no necessity for the declarations sought in prayers 33.3 and 33.4; and there was no order in respect of prayers 33.6 and 33.7. Effectively, the only prayer allowed is general and aggravated damages, if any, to be assessed by the SAR.

[12] The plaintiffs submit that in view that all the prayers sought were disallowed by the learned trial judge (except for general and aggravated damages), the first to fourth defendants' counterclaim for unlawful interference with trade and trade libel were never allowed. As such, there was no infringement of whatever rights the first to fourth defendants had. It follows that the latter are not entitled to any damages, even general damages.

[13] With respect, this contention of the plaintiffs is flawed. In the first place, it is clear that His Lordship Stephen Chung J in his judgment found and held that the first to fourth defendants had proved their claim of unlawful interference of trade and trade libel. The relevant part of the judgment is reproduced below:

> 43. The first to the fourth defendants have also counterclaimed the plaintiffs for damages for unlawful interference with their trade and libel for injuring the reputation of the first to the third defendants which they claimed had caused substantial loss to them. The evidence showed that the plaintiffs by an originating summons had applied and obtained an *ex parte* injunction against the first defendant. A news item was published in the Berita Harian in respect of the *ex parte* injunction obtained and that the plaintiffs have suffered loss and damages amounting to RM536 million because the defendants have infringed the first plaintiff's patent.
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> 44. The plaintiffs denied that the first plaintiff had instructed Berita Harian to print what they printed in the newspaper on 6.11.2014. He said all he did was to inform them of his patent case against the defendants and what they printed was none of his business. The fact is that the news item was published in the Berita Harian after PW3 had given a press interview. The contents of the news item published could only come from the first plaintiff. The plaintiffs did not allege or complain that the contents were untrue or made up or fabricated by Berita Harian or taken out of context. The plaintiffs did not make any correction or demand for a correction to be inserted in the newspaper.
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> 45. In the news item in the Berita Harian, it stated that the first plaintiff had obtained the *ex parte* injunction against the first defendant for infringing his patent which had caused him to suffer loss amounting to RM536 million. The defendants submitted that the press report was untrue and intended to injure the reputation of the first defendant because the plaintiffs did not plead in this suit or in the originating summons that they have sustained loss amounting to RM536 million. At the inter-parte hearing the plaintiff's application for the interim injunction was dismissed and the *ex parte* injunction was discharged.

46. DW3 had testified that as a result of the press report they had received numerous enquiries from clients and business associates whether they were also liable for damages for buying or using the Polytrap devices which were alleged to have infringed the patent of the plaintiffs. The first to the fourth defendants submitted that their reputation had been injured, that they lost customers and had sustained loss and damages.

47. In libel, the law presumes everything against the writer, the words presumed to be false and malicious; and it is for the writer to prove, if he can, that the words were true and the comment was fair, or otherwise make good his defence: *Drummond-Jackson v. British Medical Association* [1970] 1 AII ER 1094. The tort of defamation relating to goods or business comes under the category of an action for trade libel. If the statements made about a man's goods or business (a) is untrue and made maliciously, (b) if they are intended to produce or are reasonably likely to produce damage, and (c) if in the ordinary course of things, they do produce, it will be an actionable wrong. Trade libel can be initiated for any type of property inclusive of trademark and patent design: *Keep Good Feel Corporation Sdn Bhd & Anor v. Pharma World (M) Sdn Bhd & Ors* [2009] 1 LNS 843.

49. The plaintiffs did not plead justification or that it was fair comment. The plaintiffs did not allege that it was published on an occasion of qualified privilege. They did not establish that the words published in the Berita Harian were true. They did not insert a correction in the Berita Harian that it was wrongly published or a mistake. They did not withdraw the publication. They did not tender an apology.

50. It was intended to convey to the public that the first to the third defendants have wrongfully infringed the patent of the first plaintiff and copied the plaintiff's products in their business to the detriment of the plaintiffs. It was intended to impute that the first to the third defendants were unscrupulous in their business dealings or trades. It was intended to hold them up to hatred, contempt or ridicule in the way they conducted their business or trade. The first to the fourth defendants have established that the plaintiffs in the publication have libeled them in their business and trade. A man who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with it: *Acrow (Automation) Ltd v. Rex Chainbelt Inc* [1971] 1 WLR 20 1676.

[14] I agree with the learned SAR that based on the above paragraphs, the learned trial judge had ruled that the plaintiffs are liable for the torts of trade libel and unlawful interference with a trade committed against the first to fourth defendants. This finding of liability, in my judgment, is the basis for the learned trial judge's order that general and aggravated damages, if any, is to be assessed by the SAR. The words "if any", in my view, are mere surplusage and certainly cannot be used as a basis to nullify the trial judge's finding that the plaintiffs are liable to the first to fourth defendants for trade libel and unlawful interference with trade. It has to be said also that there could not be an order for assessment of general and aggravated damages if there is no finding of liability on the allegation of trade libel and unlawful interference with trade.

[15] As such, the SAR had not erred in law in concluding that the first to fourth defendants are entitled to general damages.

Inconsistent Quantum Of Damages Awarded

[16] According to the plaintiffs, there appear to be three different versions of the order given by the learned SAR, namely:

(i) the order pronounced on 26 January 2018 when the SAR delivered her decision, which is "the plaintiffs are to pay general damages of RM600,000 to the first to third defendants and RM600,000 to the fourth defendant". This adds up to RM1.2 million. The order based on the pronouncement on 16 January 2018 had been extracted and perfected: see Appendix C of encl. 241;

(ii) in para. 35 of the grounds of decision, the learned SAR (Appendix "B" of encl. 241) states that "based on the financial statement ... before the court, I am satisfied that each defendants (SIC): (first, second, third and fourth defendants) are entitled in the sum of RM500,000 for loss and damages caused upon their reputation." This adds up to RM2 million;

(iii) in the concluding para 43 of the Grounds of Decision, the learned SAR said as follows in respect of general damages: "I award the following damages against the plaintiffs: The plaintiff (SIC) to pay General Damages of RM600,000 respectively to the first, second, third and fourth defendants." This adds up to RM2.4 million.

[17] The plaintiffs submit that the order pronounced by the learned SAR is bad in law and should be set aside because it is inconsistent with the written grounds of decision. Furthermore, there are discrepancies in the amount arrived at in para. 35 and para. 43 of the grounds of decision.

[18] This argument can be given short shrift by saying that the terms of the order dated 26 January 2018, which was perfected and sealed, are the true orders and decision of the learned SAR. That is the very reason that the present appeal is against the decision given on 26 January and its terms as stated in the perfected order. Until the same is set aside or amended, it remains in force. The grounds of decision of the learned SAR, rightfully, should consist of the reasons and explanation for the decision and orders given on 26 January. In my opinion, if the learned SAR in her grounds of decision comes up with a different figure or award from that given when delivering her decision, that would be a misdirection on her part. It is trite that a judgment or decision cannot be varied or amended in that manner, that is, by way of the grounds of decision. That misdirection on the part of the SAR in explaining or reasoning out her decision cannot, in my view, vitiate the decision or its terms.

[19] There is therefore no merit in the plaintiffs' contention that the order dated 26 January 2018 is bad in law and ought to be set aside.

Whether The Quantum Awarded By The SAR Is Reasonable

[20] Firstly, the plaintiffs say, from the documents adduced by the first to fourth defendants relied on by the learned SAR in assessing damages, there is no evidence whatsoever relating to the purported losses suffered by the fourth defendant, namely, SEDC. The learned SAR therefore had erred in finding that the fourth defendant has suffered loss as a result of the publication. The quantum of general damages awarded to the fourth defendant ought to be set aside.

[21] I agree with the submission of the plaintiffs on this. This is because the documents produced at the hearing are not the documents of the fourth defendant. In fact, the fourth defendant had not adduced any evidence whatsoever to show to what extent the fourth defendant's trade or business is affected financially due to the publication. Hence, the quantum of RM600,000 in general damages awarded by the SAR to the fourth defendant in respect of both unlawful interference with trade or business and trade libel cannot be sustained.

[22] This is not to say that the fourth defendant is left without any remedy. In law, where no actual damage caused by the trade libel has been pleaded or proved as in the case of the fourth defendant, general damages can still be awarded for loss of goodwill and for vindication of reputation: see *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] 1 LNS 62; [2018] 4 MLJ 209. I will say more on this later.

[23] Secondly, the learned SAR in assessing damages suffered by the first to third defendants, had relied on various documents belonging to Weida Marketing Sdn Bhd, which were produced at the trial through DW1. These documents are the financial statements for the years ended 31 March 2013; 31 March 2014; 31 March 2015 and 31 March 2016 of Weida Marketing SB.

[24] However, Weida Marketing Sdn Bhd is not a party to the suit. Neither had the first to third defendants pleaded the issue of lifting the corporate veil of Weida Marketing to show the nexus between the latter and the first to third defendants. It is submitted that the learned SAR had erred in law and in fact in relying on the documents of a complete stranger to prove the losses allegedly suffered by the first to third defendants.

[25] Moreover, although the defendants had produced the financial statements for the years ending 31 March 2013; 31 March 2014; 31 March 2015 and 31 March 2016 in respect of the first defendant, there is no financial statements produced in respect of the second and third defendants. The learned SAR had therefore erred in awarding general damages to the second and third defendants.

[26] There is merit in the arguments of the plaintiffs on this point. It will be noted that according to the terms of the order dated 26 January 2018, the learned SAR had awarded a global sum of RM600,000 to the first to third defendants for general damages for loss suffered from the trade libel as well as unlawful interference with trade. This award is purportedly based on the documents produced through DW1. However, as pointed out by the plaintiffs, the computation of the alleged loss of profits of the first to third defendants in the financial years 2013, 2014, 2015 and 2016 is partly based on the documents of Wieda Marketing SB. The latter is a separate legal entity and the issue of lifting the corporate veil to show the nexus between the latter and the first to third defendants had neither been pleaded nor argued. As such, I agree with the plaintiffs that the global award of RM600,000 to the first, Second and third defendant is flawed because it is grounded partly on documentary evidence of a stranger.

[27] It needs to be pointed out that the learned SAR in awarding RM600,000 had also taken into account that the publication had left the first to third defendants with no alternative but to take proactive remedial measures to salvage and repair their clients' confidence in them. She referred to the evidence of DW1 who said that the first to third defendants invested RM328,291.64 in more promotional and marketing activities. The thing to say is that the defendants had not adduced evidence of the previous expenses on their promotional and marketing activities to show how much more they had expended on the purported extensive marketing exercises to recover their position in the market. The figure of RM328,291.64, in my view, is therefore unsubstantiated. This is one more reason for saying that the global award of RM600,000 is unreasonable.

[28] The third point raised by the plaintiffs is that they had called PW2, a qualified accountant, who gave his expert finding *vide* his affidavit affirmed on 23 May 2017 that based on his observation of the audited accounts of the first, second and third defendants it is his opinion that the first to third defendants did not incur any monetary loss in the business for the financial year ending 31 March 2016. The defendants did not put in any report to rebut the findings and opinions of PW2. The learned SAR had erred in law in not accepting the evidence of PW2.

[29] In regard to this, I agree with the contention of the defendants that PW2 could not be regarded as an expert witness. This is because PW2 had admitted under cross-examination that he did not comply with the mandatory requirements under O. 40A r. 3 of the Rules of Court 2012 in respect of expert evidence. For this reason, the evidence of PW2 is of no assistance to the plaintiffs.

[30] Fourthly, the defendants produced self-generated tables from pp. 5 to 28, vol. 1 encl. 167 to show loss of profits by the first to third defendants. These are unreliable because the financial statements of the first to the third defendants that they had produced in court show there were profits made

during the material time. Additionally, there are sales in 2014 not captured in the table of the defendants. For instance at p. 53, vol. 1, encl. 167, a sale transacted on 10 May 2014 for the sum of RM6,800 is shown. However, this sale is not captured in the table prepared by the defendants at p. 10 of the same bundle. Such failure by the defendants clearly demonstrate that the purported reduction of sale in the year of 2014 is not reliable.

[31] I agree with the plaintiffs that the self-generated tables are unreliable on account of some sales as highlighted by the plaintiffs having not been captured.

[32] Fifth, at pp. 571, 572 and 573, vol. 2, encl. 167, the defendants exhibited three letters. Page 571 is a letter dated 18 November 2014 from Jurutera Bersatu Sdn Bhd (from Sarawak); p. 572 is a letter dated 19 November 2014 from Perunding JYS Sdn Bhd (from Sarawak) and p. 573 is a letter from Lambang Suria Sdn Bhd (from Sarawak). These letters purportedly show that because of the publication on 6 November 2014, customers have ceased to have further business dealings with the defendants. The plaintiffs say that this is misleading because by making a comparison with the Table at pp. 14 to 24, vol. 1, encl. 167 (table shows all sales for the region of Sarawak from 2013 to 2016), these three companies were never the defendants' customers.

[33] Again, I have to agree with the plaintiffs on this issue. Given that the three letters relied on by the defendants in fact came from sources that were never the customers of the defendants in the first place, there was no question of these three customers ceasing to have further business dealings with the defendants. This is yet another reason for saying that the documentary evidence of defendants upon which the learned SAR had founded her assessment of general damages are unreliable.

[34] Sixth, during the subsistence of the interim injunction obtained by the plaintiffs prohibiting the defendants from selling the products in question, the defendants continued to sell the products thereby completely disregarding the court injunction. Examples of this are shown in the Table prepared by the defendants themselves. At p. 10, vol. 1, line 6 to line 9 from the bottom of the table, there are transactions that took place from 6 November 2014 to 13 November 2014 bearing the invoices number 44011, 44035, 44175, 44179. Thus, it is obvious that during the subsistence of the interim injunction, the defendants had completely disregarded the injunction and continued to sell those products. The plaintiffs submit that the defendants cannot be heard to now argue that they had suffered hardship and loss because of the prohibition from selling their products.

[35] Again, I find merit in this argument. In view that it has been shown that the defendants continued to sell the products during the subsistence of the interim injunction, it did not lie in their mouth to say that they had suffered hardship and loss because of the prohibition.

[36] Seventh, p. 557, vol. 2, encl. 167, is another piece of evidence adduced by the defendants. However, a closer look at the said email shows that the reason why the intended sale could not be concluded was because the product was out of stock. I agree with the plaintiffs that had the learned SAR taken into consideration that the sale could not be completed due to want of stock rather than as a result of the publication, there would not have been a substantial award of damages to the first to third defendants.

Decision Of This Court

[37] For the reasons stated above, I find and hold that the global award of RM600,000 in general damages to the first, second and third defendants and RM600,000 to the fourth defendant for trade libel and unlawful interference with trade are unsubstantiated and therefore unsustainable.

[38] Does this mean that the first to fourth defendants are completely without remedy? The plaintiffs submit that based on the Federal Court decision in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 1 LNS 284; [1994] 3 MLJ 777, the defendants are only entitled to nominal damages of RM10.

[39] In *Raub Australia Gold Mining*, *supra*, the plaintiff company sued for defamation and malicious falsehood. The company did not ventilate or substantiate at the trial the extent to which its business or trade is affected financially by the libelous articles and videos. Suraya Othman JCA, delivering the decision of the Court of Appeal said at para [88]:

> It is trite law that a company may sue in libel to protect its reputation. The company … need not prove actual damage since the injury need not necessarily be confined to loss of income but the loss of goodwill and reputation.

[40] Her Ladyship later at para. [92] went on to say:

> In light of the above cases, since actual damage is not proven, we will award general damages for loss of goodwill and for vindication of reputation. Taking all the facts and circumstances of the case, we are of the view that a global sum of RM200,000.00 is adequate as general damages for all the three Articles and two videos.

[41] Similarly in the present case. Although I have found that the first to fourth defendants have failed to prove actual loss and the extent to which their business or trade was affected financially by the libelous publication, they are nonetheless entitled to general damages for loss of goodwill and vindication of reputation or trade libel in other words.

[42] In assessing damages for libel, the factors to be taken into consideration are set out in *Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat* [2011] 1 LNS 1441; [2012] 2 MLJ 807. They are:

(a) the conduct of the plaintiff;

(b) the plaintiff's position and standing in society;

(c) the nature of the libel;

(d) mode and extent of the publication;

(e) the absence or refusal of retraction or apology; and

(f) the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict.

[43] It is to be noted that the learned SAR in her grounds of decision did in fact elaborate on these factors although that was in justification of the award for aggravated damages. I reproduce below the salient circumstances that the SAR had highlighted:

> 37. Based on the witness Statement of DW1 ... the first to third defendants are well-known and has a reputable standing in the public sphere and across various industries. On the other hand, the fourth defendant is a statutory body established under the laws of the State of Sarawak and is also under the purview of the Ministry of Finance. The fourth defendant was established with the general aim of promoting the commercial, industrial and socio-economic development of the state of Sarawak.
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> 39. The first to fourth defendants' claim for aggravated damages is further supported by the fact that the Libelous Statements were published in the Berita Harian newspaper, which has a nationwide circulation and on its online portal that is accessible by its readers from virtually anywhere around the world.
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> 40. This fact was not denied by the plaintiff'. They did not insert a correction in the Berita Harian that it was wrongly published or a mistake. They did not withdraw the publication. They also did not tender an apology.

[44] Stephen Chung J in his judgment had also commented on the conduct of the plaintiffs:

> The plaintiffs did not plead justification or that it was fair comment. The plaintiffs did not allege that it was published on an occasion of qualified privilege. They did not establish that the words published in the Berita Harian were true. They did not insert a correction in the Berita Harian that it was wrongly published or a mistake. They did not withdraw the publication. They did not tender an apology.

[45] It was said in *Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Sdn Bhd & Ors* [2001] 3 CLJ 571 at 599:

> General damages serve three functions:
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> (1) To act as consolation to the plaintiffs for distress suffered from the publication.

A (2) To repair the harm done to reputation (including the business reputation).

(3) As a vindication of the reputation.

[46] Having regard to the matters set out above, it is my considered opinion that the plaintiffs should pay the first, second and third defendants RM60,000 each and RM170,000 to the fourth defendant in general damages for loss of goodwill and for vindication of reputation.

B

Order

[47] The appeal against the decision of the learned SAR succeeds in part and it is ordered as follows:

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(i) The global award of RM600,000 in general damages to be paid to the first to third defendants by the plaintiffs is set aside and substituted with an award of RM60,000 each;

D (ii) The award of RM600,000 in general damages to be paid by the plaintiffs to the fourth defendant is set aside and substituted with an award of RM170,000;

(iii) The award of aggravated damages is set aside; and

E (iv) Interest on the judgment sums at the usual rate of 5% from the date of the order by the SAR until satisfaction.

[48] The parties have agreed that there will be no order as to costs.

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